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► **To cite this version:**

Emma Bell. The Scottish State and the Tartanisation of Penal Politics. Berton, Jean; Findlay, Bill. Le Crime, le châtime<sup>n</sup>t et les écossais, Presses universitaires de Franche-Comté, pp.331-347, 2019, 10.4000/books.pufc.38630 . halshs-04735284

**HAL Id: halshs-04735284**

**<https://shs.hal.science/halshs-04735284v1>**

Submitted on 14 Oct 2024

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# The Scottish State and the Tartanisation of Penal Politics

Emma Bell

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## TEXTE INTÉGRAL

1 The criminal justice system in Scotland has long been regarded as distinct from that of England (and Wales). Even following the Act of Union, Scotland retained her basic regalian state power to punish, supported by her own legal system, courts and culture. This suggests that the nation has never been entirely 'stateless', yet the Scottish State has often been regarded as essentially benign (Croall, Mooney & Munro, 2016, 9), as less likely to exercise its monopoly on violence (Weber, 1918) than the UK. It is widely asserted that the Scottish criminal justice system is 'fairer', capable of reflecting the 'values of a modern and progressive nation' by relying less on prison and focusing more on addressing the underlying social causes of crime (Matheson, 2015a). Its welfarist approach to youth justice, in particular, which aims to divert children under the age of 16 from the formal criminal justice system, 'has been widely praised nationally and internationally' for its focus on the needs of children rather than on their offending behaviour (Scottish Human Rights Commission, 2012, 26). Criminal justice in Scotland is thought to reflect distinctively Scottish values, notably its unique civic culture which purportedly favours more inclusive social and penal policies (McAra, 1999, 378). This chapter seeks to examine the validity of such claims by focusing on several main aspects of the Scottish criminal justice system: prison policy, alternatives to custody and youth justice, these being the principal areas where the differences between policies north and south of the border are often thought to be most striking. It then attempts to determine what these policies reveal about the nature of the Scottish State under the control of the SNP.



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## ricing dependency on incarceration?

has long been one of the highest in Western Europe, along as, increasing by 33 % between 1998 and 2013 (Howard c of 155 prisoners per 100 000 of the total population figure has now dropped to 143 prisoners per 100 000 (*ibid.*). fall is the direct result of the Scottish government's stated ody to the most serious of offenders (Scottish Prisons ollowing a report by the Scottish Prison Commission and Licensing (Scotland) Act 2010 introduced an automatic es of three months or less, requiring courts to publicly state ntences. Yet, a recent report carried out by the Scottish current presumption has had minimal impact on h Government, 2015). Sheriffs interviewed stated that they

had always treated custody as a last resort, irrespective of the new law (*ibid.*). Nonetheless, two thirds of custodial sentences imposed in 2013/14 were for six months or less and only 1 % of these sentences were to punish violent or sexual crimes (*ibid.*). Consequently, in September of last year, the current Justice Secretary, Michael Matheson, launched a government consultation on increasing the length of period to which the presumption against short sentences should apply.

3 The attempt to reduce the prison population by altering sentencing practice would certainly seem to be quite distinctive. Certainly, no such presumption against short sentences has so far been proposed south of the border, even if Michael Gove, the UK Justice Secretary, has also expressed concern about a high prison population and suggested that it might be 'worth analysing' the impact of short sentences as a mechanism to bring down numbers (BBC, 2015a). Furthermore, the Scottish Government has sought to reduce the number of women in prison and, in January 2015, abandoned plans to build a new 300-place prison at HMP Inverclyde. The Justice Minister instead announced the replacement of an existing women's prison at Cornton Vale with a new 80-place national prison to be supplemented with five 20-place community-based custodial units spread across the country (Matheson, 2015b). Whilst Gove has promised to ensure that women serve their sentences 'in more humane surroundings' that are favourable to rehabilitation (Gove, 2015), notably closing the infamous HMP Holloway, he has not made any explicit commitment to reduce the number of women sentenced to custody.

4 Nonetheless, Scottish policy in this regard may appear less novel and progressive to the extent that it shares UK-wide concerns about risk. Such concerns are reflected in the Prisoners (Control of Release) (Scotland) Act 2015 which ended the automatic release of long-term prisoners once they reach the two-thirds point of their sentence in the interests of public protection (MacAskill, 2013). The Government has also responded with severity to populist concerns about certain offences. Knife crime, for example, has been subjected to harsher sentencing, as has been the case in England and Wales,<sup>2</sup> with the



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that 'the average prison sentence for handling an offensive  
be times higher than in 2004-5' (SNP, 2015: 24-5). Moreover,  
in failing to lift the blanket ban on prisoner voting,  
d for human rights considerations in prison.

## **study: from prison to community?**

Scotland and England may also be noted with regard to  
north and south of the border, existing community penalties  
principal community sentences now available to the courts  
nt and Testing Orders,<sup>3</sup> Restriction of Liberty Orders<sup>4</sup> and  
es. The latter were introduced in 2011 under the Criminal  
d) Act 2010. They resemble the single Community Service  
and Wales by the Criminal Justice Act 2003 under which  
- fluorescent vests emblazoned with the words 'community  
der the penalty more visible to the public. This idea of

reparation to the community via community payback is also central to the Scottish penalty, as is made clear in its name.

6 However, in the consultation leading up to the introduction of the penalty in Scotland, the Scottish Prisons Commission made it clear that the penalty should not be 'stigmatising and shaming' but primarily rehabilitative (Scottish Prisons Commission, 2008, 37). One policy-maker interviewed around this time stated that policies incorporating 'shaming techniques' were 'incompatible with Scottish cultural sensibilities' (Hamilton, 9). Consequently, the Scottish Government has so far resisted forcing offenders to wear high-visibility vests when carrying out work for the community. The penalty is intended to be a genuine alternative to imprisonment with a strong rehabilitative element intended to tackle problems such as drug and alcohol abuse and mental health issues. There has, as yet, been no comprehensive evaluation to determine whether the penalty, introduced just five years ago, has had any significant impact on reducing the prison population. Nonetheless, approximately two-thirds of these sentences are successfully completed (Anderson *et al.*, 99), suggesting that early experience of the new penalty has been somewhat more positive than that of the Single Community Order in England and Wales where the breach rate stood at about 40 % in 2008, leading in many cases to imprisonment (Mair & Mills, 13-14). Indeed, in England and Wales, there was no overall decrease in the use of custodial sentences following the introduction of the new penalty, suggesting that it did not serve as an alternative to custody (*ibid.*, 15; Heard, 2015). Yet, in Scotland too, the custody rate remains high. In the year following the introduction of the Community Payback Sentence, 15 % of all those found guilty of an offence were sentenced to prison, representing the highest rate in ten years (Heard, 2015: 4). According to one evaluation of community sentences across the UK, there is more convergence than divergence in the different jurisdictions and 'little evidence' that community penalties 'will reduce prisoner numbers overall, or help to divert people from prison, or avoid the associated costs and other harms of incarceration' (*ibid.*, 4).

## Youth Justice: a 'jewel in the crown'<sup>5</sup> of the justice



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tish distinctiveness is more clearly visible is in the field of  
been an attempt to divert young people from custody in  
ng the famous Kilbrandon Report of 1964 and the  
land) Act 1968 which adopted an explicitly welfarist  
. With the exception of children charged with serious  
rape, all children aged between 8 and 16 who commit an  
ren's Hearing rather than a court. The non-penal nature of  
fact that it is also used to assist children in need of care and  
18 % of all children referred to a Children's Hearing  
having committed an offence (Children's Hearings Scotland,  
e involved in a hearing, they work alongside social workers  
to find a solution which is in the best interests of the child  
es, the panel will decide that familial help is sufficient but it

may also make a local authority responsible for helping the young person by, for example, stipulating where a young person may live.

8 Although widely praised for its novel approach, the Scottish system has come under some criticism, notably on human rights grounds. Whilst children and their families have always been present at hearings and encouraged to participate, there was concern about the fact that they had limited legal representation (Mellon, 13). This situation was modified following the Children's Hearing (Scotland) Act 2011. In order to address concerns regarding possible conflict of interest on the part of 'reporters' who were responsible both for bringing children to hearing and advising panel members during the hearing, the law introduced two separate bodies, charged with these separate tasks.<sup>6</sup> Nonetheless, some criticisms remain. Firstly, the new law reforming the Children's Hearings System failed to extend it to 16 and 17 year-olds who largely continue to be treated as adults in the courts.<sup>7</sup> Whilst the number of under-18s in custody has fallen considerably in Scotland in recent years (to 0.6 % of the total prison population), it is still higher than in comparably sized countries such as Norway (ICPR, 2015). Despite having a radically different youth justice system than that of England and Wales, its under-18 custodial population is similar (*ibid.*). Although Scotland raised the age at which children may be prosecuted in Scotland to 12 under section 52 of the Criminal Justice and Licensing (Scotland) Act, it remains low compared to other European countries where it generally ranges from between 14 and 18.<sup>8</sup>

9 In addition, it needs to be recognised that not all social problems can be fixed by the Children's Hearings System and that resources should be focused on community-based preventative measures (Mellon, 14). The Scottish Government has shown support for preventative measures to deal with the problems of children and young people. The 'Getting It Right for Every Child' initiative, initially launched by the minority SNP administration in 2008, aims to ensure that public services support children and their parents in compliance with the United Nations Convention on the Rights of the Child. Once again, it hopes to set Scotland apart by ensuring that it 'is the best place to grow up



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sh Government, 2013, 2). This entails adopting 'a positive  
: where children are welcomed and nurtured. One where we  
d look out for them. Where they are listened to – whatever  
ews are heard and their rights protected' (*ibid.*). One key  
m was the creation of a 'named person' by the Children and  
'014. A named person is now allocated to every child in  
e of 18. This person is usually someone already known to  
h as a health visitor or head teacher. They are to be the first  
s may talk to about any problems they may be having. Yet,  
ue approach, building on a welfarist approach to criminal  
ore generally, it does smack of state interference into  
the Family Intervention Programmes in place both north  
e programmes, initially inspired by a voluntary scheme  
'95, aim at tackling the underlying problems affecting

families which are thought to lead to antisocial behaviour. The schemes were rolled out nationally in the UK from 2006 and have been criticised in a recent evaluation for confusing families experiencing problems with those thought to be 'troublesome' and for failing to durably improve the life chances of those involved in the programme (2015). There is a risk that the schemes may serve to increase state surveillance of poor and disadvantaged families rather than providing necessary help and support (Bell, 2011, 77). The same might be said of the named person scheme which may bring particular families and young people to the attention not just of social services but also of criminal justice services if it is viewed as part of a crime prevention scheme rather than simply as a social intervention.

- 10 Nonetheless, given that children under 16 are generally spared penal measures in Scotland, perhaps the punitive potential of family interventions may be attenuated north of the border, as has been the case with other potentially punitive measures rolled out across the UK. Antisocial behaviour legislation, for example, whilst thought by some to symbolise a move away from Scotland's traditional social work approach to youth offending (Croall, 599), proved to be much less punitive in the Scottish context. Unlike in England, children under 16 cannot be imprisoned for breach of an ASBO and, in practice, the measure was actually little used (Muir, 177).
- 11 There is however one area in which the Scottish approach to young people would appear to be more severe than that in England: the practice of stop and search. According to a recent report, the overall rate of stop and search per capita is four times higher in Scotland than the rate in England and Wales (Murray, 11-12) but non-statutory stops and searches<sup>9</sup> in particular appear to be targeted disproportionately against young people, some of whom may be aged under 10 (*ibid.*, 24). Partly as a result of these findings, in March 2015 the Scottish Government appointed an Independent Advisory Group on Stop and Search on the current use of the tactic in Scotland with a particular remit to examine consensual stop and search and its use with regard to children and young people. The Group's report notes that Police Scotland have assured the Scottish Parliament that non-statutory stop and search will no longer be used with children under 12 and that it will be limited to non-statutory stop and search for all other age groups. The report commended establishing a statutory police code of practice for Scotland, following the implementation of which non-consensual stop and search will be limited to children under 18 when they have been found to be in possession of alcohol (*ibid.*, 31-34). However, the group explored the possibility of extending the use of stop and search to children under 18 when they have been found to be in possession of alcohol (*ibid.*, 37-40).



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## ness: ends and means

rily limited, the examples of prison policy, community  
otland suggest that assertions of Scottish distinctiveness in  
anced. Although the Scottish Government has expressly  
population, especially that of women, it still shares one of the  
in Western Europe, along with England and Wales. Whilst  
t been applied in such a punitive way north of the border, it

remains to be seen whether they might serve as genuine alternatives to custody, contrary to what experience has shown in England. Even Scotland's youth justice policy, while contrasting significantly with that of the rest of the UK, is not immune from criticism and has been influenced by policies put in place in England.

- 13 It has been suggested that policy convergence with England was felt most acutely when New Labour administrations were in place in both Westminster and Holyrood (McAra, 2008; Wiltshire, 2010), whilst divergence has become more noticeable since 2007 under a minority SNP government and especially since 2011 when the SNP took majority control of the Scottish Parliament. It is said that a trend towards 'detartanisation' of policy in this area has given way to 're-tartanisation' (McNeill, 2011). Yet, for Mooney *et al.*, the picture is more nuanced (2015). This assertion largely supports our analysis above. It is true that some of the more punitive aspects of policy just examined were implemented before the SNP assumed control of the Scottish Parliament, with ASBOs being the most striking example. It is also true that the new SNP administration did seem to herald a more progressive change in direction in criminal justice policy, especially with the publication of the policy document *Scotland's Choice* by the newly appointed Scottish Prisons Commission which recommended adapting policy in such a way as to affect a significant drop in Scotland's prison population. Nonetheless, as we have just demonstrated, criminal justice policy did not move in such a noticeably different direction that allows us to assert that Scotland has adopted a wholly distinctive policy in this field. There is evidence of both divergence and convergence.
- 14 Yet, according to one recent research report on criminal justice policy across the UK under the coalition, 'criminal justice policy across the three jurisdictions is generally more divergent than was the case five years ago' (Garside and Ford, 36). Nonetheless, the report reveals that this distinctiveness is less at the level of policy and more at the level of *means*, of different ways in which justice has been administered. It argues that whilst England and Wales have increasingly relied on the market in the delivery of justice, Scotland has relied instead on the State. A certain degree of centralisation may also be discussed above. In the field of youth justice, for reasons such as the creation of a named person for every child, and the power reserved for giving the state unprecedented powers to intervene in a child's life (see [www.no2np.org](http://www.no2np.org)). But the strengthening of the state's role in the delivery of justice is perhaps most evident in the Scottish context of prison privatisation. Whilst privatisation has intensified under the coalition or in majority government, with the private sector taking over the day-to-day management, from rehabilitation to punishment (Bell, 2010), the coalition did not halt the trend towards increased privatisation of the prison system. Coming to power in 2007, the SNP blocked plans for increased privatisation, even though it was obliged to honour public-private sector agreements made under the previous Labour/ Liberal Democrat administration. The trend towards privatisation work has been contracted out to the private sector, and, along with community sentences, are overseen by a new



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national public body – Community Justice Improvement Scotland – which is directly accountable to the Scottish Government. This may be seen as a centralising move since, although it leaves local authorities in control of the delivery of community justice, it gives central government more direct control over planning and strategy.

- 16 Another apparent step towards increasing the role of the Scottish state has been the merger of the eight existing policing authorities into a single service known as the Police Service of Scotland, or more commonly 'Police Scotland', in 2013 under the Police and Fire Reform (Scotland) Act 2012. It is overseen by the Scottish Police Authority, a body appointed by and accountable to the Scottish Justice Secretary. A report by the Commission on Strengthening Local Democracy, a body bringing together councillors, academics and practitioners with the aim to strengthen local services and civil society, described the creation of the new service as 'a striking expression of the centralist mindset' (cited in Garside and Ford, 23). Another critic complained that the new organisational arrangement 'places little value on localism with the country policed as one unit' but noted that 'all is not lost. The legislation that brought the single service into being ensured that every Council Ward has its own Policing Plan and therein lies the key to returning policing to its rightful community base' (Finnie, 39). Indeed, for Garside and Ford, the reform 'occupies an ambiguous position' with the merger of regional police forces being 'undeniably a centralising move that enhanced the power and authority of the Scottish state', but the lack of direct state control over the service suggesting that it is not so centralising as all that (Garside and Ford, 28). Nevertheless, they do express concerns about the extent to which Police Scotland is genuinely accountable to local communities in practice (*ibid.*).

## Criminal Justice as a reflection of Scottish values?

- 17 Despite the existence of safeguards, centralisation does of course mean that it may be more difficult to take local values into account. It has been alleged that Police Scotland has failed to respect local diversity, thus challenging the idea that Scottish criminal justice embodies local culture. The Scottish Liberal Democrat leader complained, 'Alien policies



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ted in Strathclyde, have been imposed on communities  
tematic use of armed police and surge of stop and search  
examples' (McInnes, 39). The reference to Strathclyde  
: dominated this regional force (the largest of the eight)  
ational force as a whole. This was perceived to be a 'hard',  
:h sat uneasily with policing cultures prevalent in other  
yfe, 2016). It was notably criticised for the over-use of stop  
e, and the use of armed police on routine patrols. Although  
lice carry guns (Police Scotland, 2015), the Justice Sub-  
lished to oversee the work of Police Scotland, heard  
rief Constable to the effect that armed police were involved  
es such as dangerous and drink driving (BBC, 2015b). Such  
as diametrically opposed to the tradition of informal  
ought to be present in much of Scotland (Mackenzie and



Henry, 28-30). Yet, central government has not been immune to criticism and did announce a review into police practice at the end of last year, suggesting that it may be willing to adapt to local police cultures.

18 Nonetheless, the adoption of heavy-handed policing tactics may be regarded as a response to Scottish public opinion which is perhaps more punitive than it is often suggested. Interviews with practitioners undertaken by Gerry Mooney *et al.* show that some of the most punitive policies highlighted above, such as ASBOs, were adopted in an attempt to 'democratise' policymaking in criminal justice by responding to concerns coming directly from communities (Mooney *et al.*, 215-16). This does not seem to be limited to the New Labour era. The SNP's commitment to maintaining police numbers at a time when public spending is being cut and its recent decision to end automatic release and lengthen sentences for knife crime can also be regarded as largely populist measures, going as they do against informed expert advice (Scottish Legal News, 2015). This confirms the theory advanced by certain penal policy analysts that devolution risks leaving policy-makers more susceptible to the pressure of their electorate now that they are no longer isolated in the Scottish Office (Cavadino and Dignan, 232). Public opinion surveys do not generally regard the Scots as being more progressive and less punitive than their English counterparts. British Social Attitudes Studies suggest that 'although Scotland is more social democratic in outlook than England, the differences are modest at best' and claim that such an outlook has become less rather than more prevalent since devolution (Curtice and Ormston, 2011). Furthermore, one survey comparing attitudes to punishment from an international perspective showed that there was very little difference between those of the English and the Scots with both being considerably more punitive than other nationalities surveyed (Van Dijk *et al.*, 147-53). Whilst punitive views may be fuelled largely by ignorance than reality (Hough and Roberts, 1998), these findings certainly challenge the view that Scottish justice is less punitive because it reflects distinctly Scottish values. Just as policy is both punitive and progressive, so with public opinion. Punitive opinions are just as likely to sit alongside more progressive, civic-



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abilitation and prevention rather than punishment, all Jock Tamson's bairns' (Hamilton, 9). Given these policy and opinion, it must be asked just why the Scottish uniquely Scottish distinctiveness of both.

## **Tartanisation of penal politics**

It is at least partly in the Scottish Government's desire to 'tartanise' the distinctiveness of the Scottish state. Whilst these trends were evident in the New Labour era pre-2007, it would seem that they have continued under the SNP administration, regardless of the degree of policy divergence from England and Wales. Tartanisation is indeed more evident in the content of actual *policies*. Indeed, the tartanisation of policy has several factors. On the one hand, as we have just noted, the Scottish Government is forced to respond to local public opinion which may lead it to implement policies which run counter to the image of a more

progressive civic culture in Scotland. On the other hand, it is also constrained by UK-wide policy. As Hamilton points out, 'Scotland remains particularly vulnerable to policy transfer from England given the shared border, media outlets, political parties and the fact that significant areas of criminal justice policy (terrorism, drugs and firearms) are reserved to Westminster' (2013, 9). Furthermore, prior to 2007 when a minority SNP Government came to power, it seems there was pressure to implement similar policies to those that New Labour was implementing south of the border. Finally, the Scottish Government has not been immune to budget cuts, even if these are less severe than in England and Wales. As Garside and Ford have commented, the 'dull compulsion of austerity' (2015) made itself felt nationwide, particularly with regard to legal aid. Indeed, as in England and Wales, Scotland planned to introduce legal aid reforms but, unlike in England, professional resistance forced the government to shelve these plans.<sup>10</sup> Practical spending constraints may also have influenced the desire to reduce the prison population or the creation of a single national police service (Fyfe and Henry, 2).

20 On the level of politics, however, it has been very important for the SNP to highlight divergence. As in the independence campaign, a focus on Scottish progressiveness has been a useful strategy to tartanise the debate on criminal justice. Such a strategy is particularly useful at a time when Conservative policy seems to be getting ever 'nastier'. However, conservative 'nastiness' seems to be confined at present to welfare and immigration, with Gove apparently pulling criminal justice policy south of the border in a slightly more progressive direction. In response, the Scottish Government may be tempted to tartanise the debate even further but, ironically, at the risk of alienating some of its own voters.

21 The discourse of progressiveness which is intended to highlight Scottish distinctiveness serves to reinforce the idea of the Scottish State as benign, masking the fact that apparently progressive policies have actually increased its punitive capacity. Anti-sectarian legislation, for example, introduced in 2012 (Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012), criminalising behaviour that is abusive, hateful or otherwise offensive at football matches has been seen as a measure intended to eradicate intolerance and prejudice (Lavalette, 2013: 38). However, it has been criticised as regressive by Lavalette (2013) as a coercive attempt to police the behaviour of young people, which is seen to go against the desired image of a modern, progressive Scotland. Such legislation, along with interventionist penal-welfare policies, allows the Scottish Government to be seen to be not simply passively accepting but actively moulding a more progressive society, thus reinforcing the image of the Scottish State. Ironically, however, the strengthening of the Scottish State may be the very thing that erodes the apparently uniquely Scottish character. In politics, at least in the field of criminal justice.



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Henry McLeish (former Labour First Minister in the Scottish lished under the minority SNP-led Scottish government to of imprisonment in contemporary Scotland. It reported

d Courts Act 2015, adults convicted for a second time of ce an automatic minimum prison sentence of 6 months.

The maximum sentence is four years. Young offenders face a four-month mandatory minimum custodial sentence.

**3.** These were introduced across the UK following the Crime and Disorder Act 1998. They subject offenders to mandatory drug treatment and testing aimed at addressing the causes of offending behaviour. Failure to respect the conditions of such an order may result in an offender being sentenced to a custodial sentence for the original offence.

**4.** Originally introduced under the Criminal Procedure (Scotland) Act 1995, a Restriction of Liberty Order (RLO) may place certain restrictions on the freedom of movement of an offender who would otherwise have been sentenced to custody. Failure to comply with an RLO may lead to the offender being returned to court for sentencing.

**5.** This is a term that is frequently used to describe the Children's Hearings system in Scotland. See, for example, Labour MP Karen Whitefield (2010):  
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=5590&mode=html>

**6.** Children's Hearings Scotland now advises panel members whilst a new Scottish Children's Reporters Administration is responsible for deciding whether or not children should go to hearing.

**7.** With the exception of 16 and 17 year-olds who are already subject to a compulsory supervision order, meaning that s/he has been placed under the responsibility of a local authority.

**8.** It should be noted that the age of criminal responsibility in Scotland is actually 8 years old but a child of this age may only appear before a Children's Hearing panel, not a court of law.

**9.** Non-statutory stop and search may be used in the absence of legislative grounds (such as reasonable suspicion) provided it is consensual. The practice was prohibited in England and Wales in 2003 under the Police and Criminal Evidence Act 1984 (Codes of Practice) (Statutory Instrument 2002, SI 2002/3075).



on, local resistance may help to preserve Scottish policy

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